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Supreme Court, U.S.
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No. 96 - 1655

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.

- Petitioner

vs.

JOHN ELKINS; BENEFITS SYSTEMS, INC.; MICROBE MASTERS, INC.

- Defendants

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Fifth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

DAVID L. SMITH, Petitioner
In Proper Person
2834 S. Sherwood Forest Blvd.
c/o Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

6 pp

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENT, MICROBE MASTERS, INC.

I. International Biochemicals Group, Inc. (IBG) is not an *amicus curiae*

IBG [Motion p.4] states that "[t]he most compelling reason for granting the requested leave to appeal *amicus curiae* is that there will be no party supporting the decision under review in absence of IBG". IBG even represents [Motion p.3] that "IBG is the only person that can inform the Court of relevant law and facts in opposition to Smith's petition, because the three original defendants to the district court proceeding did not file any opposition". There was no opposition filed and there is no party supporting the decision under review for reason that IBG ignored, or waived, rights.

This proceeding was initiated to revive a 1986 federal district court consent judgment in the original action. Pursuant to Fed. R. Civ. P. 81(b) the revival proceeding was "appropriately" initiated by motion against the original judgment debtors. Pursuant to Fed. R. Civ. P. 5 the attorney of record for the original judgment debtors was served. Subsequently, petitioner discovered that IBG was a possible legal successor to Microbe Masters, Inc. (MMI), one of the original judgment debtors, and an ORDER was sought, in the original action, to cause IBG to be served pursuant to Fed. R. Civ. P. 4 in order that status of IBG as a legal successor to an original judgment debtor, and obligor on the original judgment, could be determined. Again the attorney of record for the original judgment debtors was served and IBG, as well as the original judgment debtors, was "noticed".

Even though IBG knew that it was legal successor to MMI, and had assumed liability on all liabilities of MMI, IBG elected to ignore service and "notice" and did not respond, did not defend, did not appear in the District Court revival proceedings against MMI. The record so reflects. The record also reflects that no party, including MMI before dissolution and assumption of MMI's liabilities by IBG's former parent, sought relief from the original consent judgment.

On appeal in the Fifth Circuit, as pretended *amicus curiae*, IBG asserted that appeal was moot for the same reason as here but did not contend that jurisdiction of the appeal court was affected and did not seek Remand to cause trial of a purported defense to revival of the judgment against an original judgment debtor. Now IBG suggests to this Court that petitioner's application for Writ of Certiorari is moot but still does not seek Remand.

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. United States v. Munsingwear, Inc., 340 U.S. 36, at 39; 71 S.Ct. 104, at 106; 95 L.Ed. 36 (1950)

Evidently IBG is not interested in supporting MMI at trial of a purported defense to revival against MMI. IBG is not opposed to revival of the judgment against an original debtor, just the procedure used to do it. IBG is opposed to Federal Rules of Civil Procedure 81(b). There is no "gap" in the Federal Rules of Civil Procedures regarding revival of federal judgments. Rule 81(b) establishes that the Federal Rules of Civil Procedure, not a forum state's procedures, govern revival of a money judgment in federal district court.

II. Consent to file *amicus curiae*

IBG represents that Smith has refused to grant IBG's request for consent to file an *amicus curiae* Brief. IBG even represents that it "could not obtain consent from the original defendant ...MMI, because...[MMI was] dissolved". Let me get this straight - IBG was unable to get consent from itself to put forth a Brief in support of itself. George Orwell would be proud.

Smith is not opposed to IBG's Motion, or proposed *amicus curiae* Brief, or even its Motion Suggesting Mootness, to the extent that either bring to the attention of the Court relevant matter not already brought to its attention. While it is true that an *amicus curiae* does not have to be totally disinterested and may support any legal position or argument that the *amicus curiae* thinks will assist the Court, including a partisan position, an *amicus curiae* should not be a "party in disguise" trying to retrieve rights that were ignored, or waived. Smith is not opposed to IBG bringing to the attention of the Court the ARGUMENT [P. 7 through 14] of IBG's proposed Brief.

However, Smith is opposed to this Court's granting IBG's Motion for leave to file an *amicus curiae* Brief supporting MMI to the extent the Motion, or proposed *amicus curiae* Brief, injects extraneous pleadings as "facts" which are not in the record and are not relevant. If the extraneous pleadings were "facts", or were relevant, one of the lower courts would have considered them. Neither the Fifth Circuit nor Smith find IBG's Appendix B and C even remotely relevant. The Fifth Circuit specifically Ordered the exclusion of the pleadings appearing in IBG's Appendix B and C. Actually, even IBG doesn't find the "facts" relevant.

IBG's ARGUMENT [proposed Brief p. 7 through 14] fails to make even one reference to either Appendix B or C.

III. Conclusion

Petitioner, David L. Smith, requests that this Court not allow International Biochemicals Group, Inc. to file its proposed *amicus curiae* Brief opposing petitioner's application for Writ of Certiorari except as noted.

David L. Smith 5/23/97

DAVID L. SMITH, Petitioner
In Proper Person
2834 S. Sherwood Forest Blvd.
c/o Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

May 23, 1997

Clerk of Court
U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

re: No. 96-1655 David L. Smith vs. John Elkins, Benefits Systems, Inc. Microbe Masters, Inc.

Gentlemen or Ladies:

Enclosed is original and 11 copies of my Opposition to Motion for Leave to file brief of *amicus curiae* in Oppostion to the petitioner for writ of certiorari and in support of respondent, Microbe Masters, Inc.

Also enclosed is original and 1 copy of my affidavit of service of this Opposition to counsel of record.

Please file as appropriate. Any copies in excess of your requirements please stamp and return in enclosed self addressed stamped envelope.

I may be reach 504/291-8003 if any questions.

Yours very truly,

David L. Smith

enclosures

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